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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 494

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Isabel K. Dibblee prays for a writ of certiorari to review an opinion of the United States Circuit Court of Appeals for the Ninth Circuit (75 Fed. (2d) 617; R. 92-95), filed on February 5, 1935, affirming an order of redetermination of the United States Board of Tax Appeals (R. 78, 79).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner is and at all times hereinafter mentioned was a taxpayer domiciled in the State of California (R. 16). On March 28, 1926, Harriett deWitt Kittle, the mother of petitioner, died domiciled in the State of California leav-

ing by will all her property to her four children share and share alike (R. 16, 21, 22). The decedent's will was duly probated, and her estate, upon decree of final distribution dated May 21, 1927 (R. 32-52), was distributed according to the terms of the will. Petitioner received as part of her share of the estate specific stocks and bonds (R. 17-19).

At various times between April 18, 1928, and December 18, 1928, petitioner sold on the market certain of the bonds and shares of stock she had so received from her mother (R. 19, 20). It is evident that said sales were made more than two years after her mother's death but less than two years after the date of the decree of distribution of her mother's estate (R. 20). Petitioner realized gains upon said sales in the total amount of $28,441.86 (R. 21), and, in her income tax return for the calendar year 1928, computed and reported her gains upon said sales as capital gains taxable at the capital gain rates on the theory they were realized from sales of capital assets within the meaning of Section 101 (c) of the Revenue Act of 1928, 45 Stat. 791, 811 (R. 21). Respondent contends that the gains are taxable as ordinary income at the normal and surtax rates and he asserted a resulting deficiency of $1,690.30 in petitioner's income tax for the calendar year 1928 (R. 64-68). The United States Board of Tax Appeals entered its decision for respondent (R. 78, 79). That decision was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit (R. 95).

QUESTION PRESENTED.

May bonds and shares of stock acquired by petitioner, as a general legatee under the will of a decedent who died March 28, 1926, and sold or otherwise disposed of by petitioner only on dates between April 18, 1928, and December

18, 1928, be said *not* to have been held for more than two years within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, 45 Stat. 791, 811, merely because the decree of distribution of the estate of the decedent was not entered until May 21, 1927?

REASONS FOR ALLOWANCE OF THE WRIT.

1. The decision below is in direct conflict with the decision rendered by the United States Circuit Court of Appeals for the First Circuit in *First National Bank of Boston vs. United States* (1935), 76 Fed. (2d) 200. A petition for a writ of certiorari in the *First National Bank of Boston* case has been filed with the Clerk of this Court by the Government and the case is No. 110 on the October, 1935, Docket.

2. The decision below is in direct conflict with the decision rendered by the United States Circuit Court of Appeals for the First Circuit in *Lee vs. Commissioner of Internal Revenue* (1935), 76 Fed. (2d) 203. A petition for a writ of certiorari in the *Lee* case has been filed with the Clerk of this Court by the Government and the case is No. 111 on the October, 1935, Docket.

3. The point of law at issue in the instant case was taken by the United States Board of Tax Appeals below (R. 75, 76) to be the same as that presented in *McFeely vs. Commissioner of Internal Revenue* (1934), 29 B. T. A. 998, affirmed (C. C. A. 3, 1934), 74 Fed. (2d) 1017, in which case this Court *granted* a petition for a writ of certiorari on May 20, 1935, ... U. S. .... (Docket No. 24).

4. The decision below is in conflict with the principle, enunciated by this Court in *Brewster vs. Gage* (1930), 280 U. S. 327, that a legatee acquires property from the estate

of a decedent as of the date of the decedent's death and not as of the date of distribution.

5. The decision below is necessarily in conflict with California statutes and with applicable local decisions in that it fails to give effect to the California rule that legal title to personal property vests in the legatee forthwith upon a testator's death, that that title is in no way dependent upon the decree of distribution, and that the executor's possession of the property of an estate is the possession of the legatee.

6. The decision below is in conflict with the principle, enunciated by this Court in *Helvering vs. Bliss* (1934), 293 U. S. 144, that the capital gain sections of the Federal Revenue Acts are liberalizations of the law and are not to be narrowly construed.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit and submits her brief, hereto attached, in support of this petition.

Respectfully submitted,

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OCTOBER TERM, 1935.

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ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The memorandum opinion of the United States Board of Tax Appeals (R. 69-78) was promulgated February 13, 1934, and is found at 29 B. T. A. 1070. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 92-95) was filed February 5, 1935, and is found at 75 Fed. (2d) 617.

JURISDICTION.

This petition is submitted under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 938. The date of the judgment asked to be reviewed is February 5, 1935 (R. 95). Petitioner's petition for rehearing was denied September 6, 1935 (R. 96).

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding:

1. That the bonds and shares of stock sold by petitioner were held by her, within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, only from the date of distribution of the decedent's estate and not from the date of death of the decedent.

2. That the bonds and shares of stock sold by petitioner between April 18, 1928, and December 18, 1928, both dates inclusive, were not, at the time of sale, capital assets within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

3. That Section 101 and Section 113 (a) (5) of the Revenue Act of 1928 are to be read together and that basis date and acquisition date must necessarily be one and the same.

4. That the gains realized by petitioner upon the sale of said shares were not taxable at the rate applicable to capital gains but were taxable as ordinary income at the normal and surtax rates.

5. That the California rule that title to property transmitted by will vests in the legatee immediately upon the decedent's death is not material in determining the date from which the legatee holds property within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

6. That the determination of the United States Board of Tax Appeals that there was a deficiency in petitioner's income tax for the calendar year 1928 in the amount of One Thousand Six Hundred Ninety and 30/100 Dollars ($1,690.30) was not correct.

ARGUMENT.

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION RENDERED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN FIRST NATIONAL BANK OF BOSTON VS. UNITED STATES (1935), 76 FED. (2D) 200.

The facts of the *First National Bank of Boston* case, in so far as they are pertinent here, are similar to those of the instant case: The petitioners were testamentary trustees of the residuum of an estate consisting in part of securities. More than two years after the death of decedent, but less than two years after the residue was turned over to the petitioners by the executor, some of the securities were sold at a price above their basis for tax purposes. The Court held, under *Brewster vs. Gage* (1930), 280 U. S. 327, that the petitioners acquired and therefore held the corpus of the trust for more than two years prior to said sale and that the gain realized was a capital gain and was to be taxed as a capital gain.

The United States Circuit Court of Appeals for the Second Circuit specifically recognized the conflict existing between the decision of the First Circuit and the decision of the court below when it said, in *Ogle vs. Helvering* (1935), 77 Fed. (2d) 338, 339:

> "The question is whether she 'held' the shares from October 31, 1925, or from January 28, 1927; on this depends her privilege under Section 101 (a) to limit her tax to one-eighth of the gain. If she 'held' them only from the date of distribution, the gain was part of her ordinary income, as the commissioner and the Board have held. The Circuit Courts of Appeal of the Third

and Eighth (Ninth) Circuits have decided the point in favor of the Treasury; that of the First, *contra*. *McFeely vs. Helvering*, 74 F. (2) 1017 (C. C. A. 3); *Dibblee vs. Helvering*, 75 F. (2) 617 (C. C. A. 9); *First National Bank vs. United States*, 75 F. (2) .... (C. C. A. 1)."

The United States Circuit Court of Appeals for the Eighth Circuit also recognized the conflict existing between the decision below and that of the First Circuit when it said, in *Rand vs. Helvering* (1935), ... Fed. (2d) .... (353-A Commerce Clearing House, paragraph 9542; Prentice Hall, Inc. Federal Tax Service, 1935, paragraph 1789):

"Whether such holding was for more than two years, depends upon whether it began at the death of Alonzo T. Rand or at the date of distribution of this stock to petitioner. The Board confirmed the Commissioner (30 B. T. A. 1464), upholding date of distribution. This it did upon the authority of McFeely, 29 B. T. A. 998 and Dibblee, 29 B. T. A. 1070, without further statement of reasons. These two citations have passed to affirmance in *McFeely vs. Helvering*, 74 F. (2d) 1017, C. C. A. 3, and *Dibblee vs. Helvering*, 75 Fed. (2d) 617, C. C. A. 9. The same view has been taken in *Ogle vs. Helvering*, 77 Fed. (2d) 338, C. C. A. 2 (where the petitioner was another heir of Alonzo T. Rand), and the contrary view is declared in *First Nat. Bank of Boston vs. United States*, 76 Fed. (2d) 200, C. C. A. 1."

A petition for a writ of certiorari in the *First National Bank of Boston* case has been filed by counsel for the Government and the case is No. 110 on the October, 1935, Docket.

2. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION RENDERED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN LEE VS. COMMISSIONER OF INTERNAL REVENUE (1935), 76 FED. (2D) 203.

In the *Lee* case

> "The main issue is the same as that involved in the case of *First National Bank of Boston, et al., vs. United States*, 76 F. (2) 200, decided by this Court on March 9, 1935. There was a sale of securities by a residuary legatee in 1929, more than two years after the death of the testator, but less than two years from the date of distribution. * * * Since the acquisition of the securities sold dates back to the death of the testator, *Brewster vs. Gage*, 280 U. S. 327, * * * they were held more than two years and should be treated in assessing the tax as a capital gain, although the amount of the gain was properly determined under Sec. 113 (a) (5). See *First National Bank of Boston, et al., vs. United States, supra.*"

The identity of the Court's conclusion in the *Lee* case with that reached in *First National Bank of Boston vs. United States* necessarily demonstrates its conflict with the decision of the Ninth Circuit below.

A petition for a writ of certiorari in the *Lee* case has been filed by counsel for the Commissioner and the case is No. 111 on the October, 1935, Docket.

3. THE POINT OF LAW AT ISSUE IN THE INSTANT CASE WAS TAKEN BY THE UNITED STATES BOARD OF TAX APPEALS BELOW TO BE THE SAME AS THAT PRESENTED IN McFEELY VS. COMMISSIONER OF INTERNAL REVENUE (1934), 29 B. T. A. 998, AFFIRMED (C. C. A. 3, 1934), 74 FED. (2D) 1017, IN WHICH CASE THIS COURT GRANTED A PETITION FOR A WRIT OF CERTIORARI, ON MAY 20, 1935, ... U. S. .....

In the *McFeely* case one Given died domiciled in Pennsylvania in 1919. In the same year his widow elected to take against the will of her husband one-half of his estate in lieu of her dower under the laws of Pennsylvania. No later than August 1, 1925, the widow gave the petitioner one-tenth of her interest in said estate. The petitioner received securities as her interest upon the distribution of the estate on November 3, 1927. The petitioner sold at a gain certain of these securities on March 14, 1929. In her income tax return the petitioner treated that gain as a capital gain. The Commissioner determined that it was ordinary income. The Board of Tax Appeals upheld the Commissioner's determination, 29 B. T. A. 998, and the United States Circuit Court of Appeals for the Third Circuit affirmed that decision on the bare ground that no precedent or principle was involved, 74 Fed. (2d) 1017.

It is thus evident that in the *McFeely* case a result similar to that in the decision below was reached. Indeed, the United States Board of Tax Appeals rested its decision below flatly upon the authority of its earlier opinion in the *McFeely* case (R. 75):

> "The view which we have taken herein is in accordance with our decision in the case of *Nancy K. McFeely*, 29 B. T. A. .... (No. 117), which case is not identical upon the facts, but presents the same question of law."

It is submitted that, inasmuch as, on May 20, 1935, a petition for a writ of certiorari was granted by this Court in the *McFeely* case, ... U. S. ....., petitioner's application for a writ of certiorari in the instant case should also be granted.

4. THE DECISION BELOW IS IN CONFLICT WITH THE PRINCIPLE, ENUNCIATED BY THIS COURT IN BREWSTER VS. GAGE (1930), 280 U. S. 327, THAT A LEGATEE ACQUIRES PROPERTY FROM THE ESTATE OF A DECEDENT AS OF THE DATE OF DECEDENT'S DEATH AND NOT AS OF THE DATE OF DISTRIBUTION.

In *Brewster vs. Gage*, this Court decided that, under Section 202 (a) (3) of the Federal Revenue Act of 1921, which defined the basis of property acquired by inheritance to be its fair market price or value "at the time of such acquisition," the basis of stocks passing to a residuary legatee is not their value at the date of distribution, but is, instead, their value at the date of decedent's death. In so holding this Court said:

> "Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. * * *
>
> "* * * And we think that in substance it would not

be inconsistent with the rules of law governing the descent and distribution of real and personal property of decedents to construe the words in question to mean the date of death. * * *

"* * * The generality of the words used in both Acts indicates intention that the value at the time of death of the decedent was to be taken as the basis in all cases" (pp. 334, 335 of 280 U. S.).

The Court below, on the other hand, fails utterly to recognize that a general legatee, upon the death of a decedent, is vested immediately with a right to his distributive share; that the decree of distribution confers no new right upon the legatee; and that his title relates back to the date of death. No mention is made by the Court below of the *Brewster* case. It is submitted that, by overlooking that decision, the Court below runs counter to this Court's enunciation therein, and reaches the absurd conclusion that, although a general legatee does not *hold* property from the date of death of his decedent, he nevertheless *acquires* that property on that date within the meaning of the Revenue Acts. The Court below has decided the question before it in a way in conflict with an applicable decision of this Court.

5. THE DECISION BELOW IS NECESSARILY IN CONFLICT WITH CALIFORNIA STATUTES AND WITH APPLICABLE LOCAL DECISIONS IN THAT IT FAILS TO GIVE EFFECT TO THE CALIFORNIA RULE THAT LEGAL TITLE TO PERSONAL PROPERTY VESTS IN THE LEGATEE FORTHWITH UPON A TESTATOR'S DEATH, THAT THAT TITLE IS IN NO WAY DEPENDENT UPON THE DECREE OF DISTRIBUTION, AND THAT AN EXECUTOR'S POSSESSION OF THE PROPERTY OF AN ESTATE IS THE POSSESSION OF THE LEGATEE.

The California statutes specifically provide that testamentary dispositions are presumed to vest at the testator's death (Section 1341 of the Civil Code of California (1920), now Section 28 of the Probate Code of California (1931); see appendix); that when a person dies the title to his property, real and personal, passes forthwith to the person to whom it is devised or bequeathed or to the person succeeding to his estate, subject only to the allowances of administration, to the payment of decedent's debts and to the possession of the executors for purposes of administration (Sections 1363, 1384 of the Civil Code of California (1920), now Section 300 of the Probate Code of California (1931); Section 1452 of the Code of Civil Procedure of California (1920), now Section 581 of the Probate Code of California (1931)).

The Supreme Court of California has given full effect to these statutory provisions. Thus, in *Western Pacific Railway Co. vs. Godfrey* (1913), 166 Cal. 346, 349, 136 Pac. 284, 285, the court adopted the following language of the District Court of Appeals:

> "That the estate of a decedent vests in his heir or devisees and legatees immediately upon his death cannot be disputed. * * *

> "Pending the administration the personal representatives of the decedent are entitled to the possession of the estate for the purposes of administration, but the title vests in the heirs or devisees and legatees, subject only to the right of possession of the personal representatives of the decedent. * * *
>
> "The legatee does not derive title from the decree of distribution, but from the will, which takes effect immediately upon the death of the testator. The decree of distribution does not create the title. It merely declares the title that accrued under and by the will. * * *"

And in *Murphy vs. Crouse* (1901), 135 Cal. 14, 17, 66 Pac. 971, 972, it was said:

> "Here both real and personal property descend directly to the heir, or to the beneficiary named in the will, with a qualified right in the personal representative, who holds it for the purposes of administration more like a receiver than like a common-law executor. The title is not in him, nor has he the power of disposal, save by order of the court."

To a like effect are *Lichtenberg vs. Burdell* (1929), 101 Calif. App. 20, 36, 281 Pac. 518, 525; *United States Fidelity & Guaranty Co. vs. Mathews* (1929), 207 Cal. 556, 559, 279 Pac. 655, 656; *In Re Yorba's Estate* (1917), 176 Cal. 166, 169, 167 Pac. 854, 855, 856; *Bates vs. Howard* (1894), 105 Cal. 173, 183, 38 Pac. 715, 718; *Spotts vs. Hanley* (1890), 85 Cal. 155, 167, 24 Pac. 738, 741.

It is submitted the decision below utterly ignores the effect of the California statutes and the above decisions when the court reaches a conclusion that a general legatee does not hold property from the date of death of his decedent. The

decision below, therefore, is in conflict with applicable local decisions.

6. THE DECISION BELOW IS IN CONFLICT WITH THE PRINCIPLE, ENUNCIATED BY THIS COURT IN HELVERING VS. BLISS (1934), 293 U. S. 144, THAT THE CAPITAL GAIN SECTIONS OF THE FEDERAL REVENUE ACTS ARE LIBERALIZATIONS OF THE LAW AND ARE NOT TO BE NARROWLY CONSTRUED.

This Court in *Helvering vs. Bliss* (p. 151 of 293 U. S.), said:

> "The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed."

It is submitted that the decision below, instead, necessarily rests upon a narrow construction of the capital gain sections of the Revenue Act of 1928.

CONCLUSION.

For the reasons stated, petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit and that this Court review the judgment of the Court below in this case.

Dated October 2, 1935.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Section 101 (a):

> In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

Section 101 (c):

> For the purposes of this title—
>
> * * * * * * * * *
>
> (8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—
>
> * * * * * * * * *
>
> (B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain

or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

Section 113 (a):

The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * * *

(5) If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

Civil Code of California (1920):

Section 1341

Testamentary dispositions, including devises and bequests, to a person on attaining majority, are presumed to vest at the testator's death.

Section 1363

In a specific devise or legacy, the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the Superior Court to sell the property devised and bequeathed in the cases herein provided.

Section 1384

The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the Probate Court, and to the possession of any administrator appointed by that court, for the purposes of administration.

Code of Civil Procedure of California (1920):

Section 1452

The executor or administrator is entitled to the possession of all the real and personal property of the decedent, and to receive the rents and profits of the real estate until the estate is settled or until delivered over by the order of the court to the heirs or devisees; and must keep in good tenantable repair, all houses, buildings and fixtures thereon which are under his control. After the expiration of the time for the presentment of claims, he is not entitled to recover the possession of any property of the estate from any heir who has succeeded to the property in his possession, or from any devisee or legatee, to whom the property has been devised or bequeathed, or from the assignee of any such heir, devisee or legatee, unless he proves that the same is necessary for the payment of debts or legacies, or of expenses of administration already accrued; or for distribution to some other heir, devisee or legatee entitled thereto. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the possession of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do.